Kamuja Hartamas Sdn Bhd (formerly known as Aras Suasana Sdn Bhd) v Bank Kerjasama Rakyat Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-(MUA)(W)-1322–08 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
7 FEBRUARY 2017

Contract — Termination — Wrongful termination — Bank terminated bridging finance facility to appellant after disbursing only one out of three agreed tranches — Whether evidence at trial showed parties reached understanding to restructure and extend tenure of facility — Whether bank's termination letter itself evidenced proposal to restructure facility — Whether bank's termination letter did not contain any valid reason for termination of facility — Whether termination unlawful — Whether damages quantified by appellant for wrongful termination could not be granted as evidence adduced in favour of same not wholly reliable — Whether appellant had to prove its loss at hearing for assessment of damages

The instant appeal was against the High Court's dismissal of the appellant's counterclaim against the respondent for damages for wrongful termination of a RM9,846,000 bridging finance facility ('the facility') which the respondent had granted to the appellant for the purpose of buying land and developing a housing project thereon ('the project'). The respondent was to have disbursed the facility in three tranches but it only released the first tranche of RM3,346,000 which enabled the appellant to buy the land and charge it to the respondent as security. The appellant could not proceed further with the project because of the local authority's delay in issuing a development order for the land and the respondent's failure to consent to an application to subdivide the land for the project. The appellant then applied to the respondent to restructure the facility and extend its tenure for another three years, and, in consideration, offered to deposit another RM1m with the respondent as further security. The respondent did not respond to the restructuring proposal but during negotiations between the parties asked the appellant to pay an additional RM600,000, which the latter did on the understanding the payment was a condition for the restructuring of the facility. About four years after the first tranche had been disbursed and the original tenure of the facility had expired, the respondent terminated the facility. In the termination letter, the respondent stated, inter alia, that the appellant had failed to comply with its proposal to restructure the facility. It demanded payment of monies owing under the facility and filed a claim against the appellant in the High Court. Following a trial, the appellant settled the respondent's claim leaving only the

counterclaim to be determined. The trial court dismissed the counterclaim after finding that the respondent had not agreed to any restructuring of the facility and that the termination of the facility was lawful.

Held, allowing the appeal and ordering the registrar of the High Court to assess the damages, if any, suffered by the appellant as a result of the wrongful termination of the facility:

(1) The respondent's termination notice was bad for two main reasons. First, it did not stipulate what were the terms the appellant failed to observe that justified the termination except to say 'gagal mematuhi penyelesaian tersebut'. Secondly, the respondent took an inconsistent stand that no restructuring agreement was concluded but yet cited and relied on the purported failure of the appellant to comply with the terms of settlement to justify termination. On analysing the termination notice in the context of the background setting of the purported restructuring, the facts revealed that the grounds relied upon by the respondent in the termination letter were wrongful. The respondent had not provided a proper justification for termination of the facility which rendered the termination unlawful (see paras 14 & 22).

(2) The trial judge after having examined the various correspondences between the parties held that the respondent had not agreed to any restructuring of the facility. In so finding, she ignored the termination letter which clearly acknowledged and admitted the existence of an agreement to restructure the facility. On top of that, the termination notice placed reliance on the appellant's failure to adhere to the terms of settlement being the ground for the termination. The trial judge failed to give due consideration to the evidence of the respondent's own witness, PW3, who admitted that the respondent had set down three requirements for the appellant to fulfill for the restructuring and that the appellant had fulfilled two of them; and that the third requirement concerning conversion of the land required the respondent's approval to the application for conversion but the respondent had withheld giving its consent (see paras 16–17).

(3) The trial judge failed to consider that the parties had continued to negotiate the restructuring of the facility even after the original tenure of the facility expired on 24 December 2011. Therefore time had become at large and was no longer of the essence of the contract (see para 20).

(4) In its counterclaim, the appellant claimed RM34,323,431.08 as damages based on the unchallenged report of a quantity surveyor ('DW1') who showed that the appellant would have made that sum had the project proceeded. Whether or not there was a challenge to the report by DW1, the appellant had to first establish what were the damages resulting from the wrongful termination. It could not be assumed that the wrongful

termination per se caused the project to scuttle as there was evidence that even if the respondent had disbursed the remaining two tranches of the facility it still would not have been sufficient funds for the appellant to complete the project (see para 27).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap penolakan Mahkamah Tinggi terhadap tuntutan balas perayu terhadap responden bagi ganti rugi untuk penamatan salah kemudahan pembiayaan penyambung sebanyak RM9,846,000 ('kemudahan') yang mana responden telah berikan kepada perayu bagi tujuan pembelian tanah dan membangunkan projek perumahan di situ ('projek'). Responden perlu melepaskan kemudahan dalam tiga *tranche* tetapi hanya melepaskan *tranche* pertama sebanyak RM3,346,000 yang mana membolehkan perayu membeli tanah dan mencajnya kepada responden sebagai jaminan. Perayu tidak dapat meneruskan projek tersebut kerana kelewatan pihak kuasa tempatan dalam mengeluarkan perintah pembangunan bagi tanah tersebut dan kegagalan responden untuk mengizinkan permohonan untuk membahagikan tanah tersebut bagi projek tersebut. Perayu kemudiannya memohon kepada responden untuk menyusun semula kemudahan tersebut dan melanjutkan tempohnya untuk tiga tahun lagi, dan dalam balasan, menawarkan untuk mendeposit RM1 juta lagi dengan responden sebagai jaminan lanjut. Responden tidak memberi respons kepada cadangan penyusunan semula tersebut tetapi semasa perundingan di antara pihak-pihak meminta perayu untuk membayar tambahan sebanyak RM600,000, di mana perayu telah bayar atas pemahaman bayaran tersebut adalah syarat untuk penyusunan semula kemudahan tersebut. Lebih kurang empat tahun selepas *tranche* pertama telah dilepaskan dan tempoh asal kemudahan telah tamat, responden menamatkan kemudahan tersebut. Dalam surat penamatan tersebut, responden menyatakan, antara lain, bahawa perayu telah gagal untuk mematuhi dengan cadangannya untuk menyusun semula kemudahan tersebut. Ia menuntut bayaran wang yang kena dibayar di bawah kemudahan tersebut dan memfailkan tuntutan terhadap perayu di Mahkamah Tinggi. Berikutan perbicaraan, perayu menyelesaikan tuntutan responden dengan tinggal hanya tuntutan balas untuk ditentukan. Mahkamah perbicaraan menolak tuntutan balas tersebut selepas mendapati bahawa responden tidak bersetuju kepada apa-apa penyusunan semula kemudahan tersebut dan bahawa penamatan kemudahan tersebut adalah sah.

Diputuskan, membenarkan rayuan dan memerintah pendaftar Mahkamah Tinggi untuk menilai ganti rugi, jika ada, yang dialami oleh perayu akibat penamatan salah tersebut kemudahan:

(1) Notis penamatan responden adalah tidak betul atas dua sebab utama. Pertama, ia tidak menetapkan apa syarat yang perayu gagal untuk mematuhi yang menjustifikasikan penamatan kecuali menyatakan 'gagal

mematuhi penyelesaian tersebut'. Kedua, responden tidak konsisten dalam pendirian bahawa tiada perjanjian penyusunan semula diputuskan tetapi merujuk dan bergantung atas kegagalan yang dikatakan terhadap perayu untuk mematuhi dengan syarat penyelesaian untuk menjustifikasikan penamatan tersebut. Dalam menganalisa notis penamatan tersebut dalam konteks latar belakang penyusunan semula yang dikatakan, fakta menunjukkan bahawa alasan yang digunakan oleh responden dalam surat penamatan tersebut adalah salah. Responden tidak memberikan justifikasi yang betul bagi penamatan kemudahan tersebut yang menyebabkan penamatan adalah tak sah (lihat perenggan 14 & 22).

(2) Hakim perbicaraan selepas memeriksa beberapa surat menyurat di antara pihak-pihak memutuskan bahawa responden tidak bersetuju kepada apa-apa penyusunan semula kemudahan tersebut. Dalam dapatan tersebut, beliau tidak mengendahkan surat penamatan yang jelas menerima dan mengakui kewujudan perjanjian untuk menyusun semula kemudahan tersebut. Tambahan pula, notis penamatan kerja meletakkan penggantungan ke atas kegagalan perayu untuk mematuhi terma-terma penyelesaian sebagai alasan untuk penamatan. Hakim perbicaraan gagal untuk memberi pertimbangan yang wajar kepada keterangan saksi responden sendiri, PW3, yang mengakui bahawa responden telah menetapkan tiga kehendak untuk perayu penuhi bagi penyusunan semula tersebut dan bahawa perayu telah memenuhi dua daripadanya; dan bahawa kehendak ketiga berkaitan penukaran tanah memerlukan kebenaran responden kepada permohonan untuk penukaran tetapi responden telah menahan daripada memberi izinnya (lihat perenggan 16–17).

(3) Hakim perbicaraan gagal untuk mempertimbangkan bahawa pihak-pihak telah terus berunding untuk penyusunan semula kemudahan tersebut walaupun selepas tempoh asal kemudahan tamat pada 24 Disember 2011. Oleh itu, masa adalah munasabah dan bukan lagi menjadi inti pati kontrak (lihat perenggan 20).

(4) Dalam tuntutan balasnya, perayu menuntut sebanyak RM34,323,431.08 sebagai ganti rugi berdasarkan laporan juruukur bahan yang tidak ditentang ('DW1') yang menunjukkan bahawa perayu boleh mendapat jumlah tersebut sekiranya projek tersebut diteruskan. Sama ada atau tidak terdapat tentangan kepada laporan oleh DW1, perayu perlu dahulu membuktikan apakah ganti rugi akibat daripada penamatan salah. Ia tidak dapat dianggap bahawa penamatan salah itu sendiri menyebabkan projek tidak siap kerana terdapat keterangan bahawa jikapun responden telah melepaskan kedua-dua *tranche* kemudahan yang tinggal ia masih menjadi dana yang tidak mencukupi untuk perayu menyiapkan projek tersebut (lihat perenggan 27).]

Notes

For cases on wrongful termination, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7110–7115.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Loke Yuen Cheng & Anor v Vimtex Sdn Bhd [1998] 4 MLJ 169, CA (refd)

Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245 (refd)

Legislation referred to

Companies Regulations 1966 Form 24

Housing Development (Control and Licensing) Act 1966

Appeal from: Suit No 22M-59–06 of 2013 (High Court, Kuala Lumpur)

Fiona Bodipalar (Jason Chan and Natasha Louis with her) (S Mathew & Assoc) for the appellant.

Mokhzani Harrin bin Yusof (Norzidatul Aini bt Mohd Nazri and Juliana bt Ismail with him) (Goh Rafidah Tan) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] The plaintiff, Bank Kerjasama Rakyat Malaysia Bhd claimed against the first defendant for the recovery of monies which was due and payable under the financing facilities granted by the plaintiff. The second and third defendants were sued as guarantors. After a full trial and before the learned High Court judge proceeded to deliver her decision, the first defendant paid the amount claimed by the plaintiff. The learned High Court judge then proceeded to decide only on the counterclaim of the first defendant which Her Ladyship had dismissed. This appeal by the first defendant emanates from the dismissal of the counterclaim.

[2] We have heard the appeal and had allowed the appeal of the first defendant. We ordered for damages to be assessed by the registrar at the High Court. We set out below our reasons for our decision.

[3] The financing facilities granted by the plaintiff was an Islamic banking facilities ('the facilities'). The purpose of the said financing facilities was to part finance 70% of the purchase of certain lands in Bangi, known as Lot No 3222, 3223 and 3224 Mukim Dengkil, Daerah Sepang, Selangor with a combined land area of 12,3125 acres ('the land'). The land was for the purpose of

development of a mixed housing project ('the project'), by the first defendant. The facilities was therefore granted for bridging facilities of the project.

[4] The disbursement of the facilities was to be made in three tranches. Tranche 1 was for RM3,345,000. Tranche 1 was based on the principle of *Al-Bai Bithaman Ajil* ('BBA'). The first defendant by an asset purchase agreement dated 28 November 2008 ('APA') agreed to sell the land to the plaintiff at a purchase price of RM3,345,000. This amount was released to the first defendant and was used by the first defendant to buy the land. Following that, the land was charged to the plaintiff as security to the BBA facility.

[5] Tranche 2 was for RM500,000 to be used for infra structure work and Tranche 3 was for the sum of RM6m to part finance the construction costs. These two tranches were based on *Istisna'* Financing. Under these agreements the plaintiff was obliged to construct and complete the project and deliver to the first defendant the completed project. In exercise of its right under the agreement, the plaintiff appointed the first defendant to complete the project. Tranche 2 and Tranche 3 were not disbursed as the first defendant was said to have defaulted and thereby the facilities was terminated by the plaintiff.

[6] The plaintiff had first filed an action against the first defendant vide Civil Action No D22A-743 of 2010 claiming the sum due and payable in respect of the Tranche 1. However, the said action was withdrawn against the defendants with liberty to file afresh, pending settlement negotiations between parties.

[7] The negotiations failed. The plaintiff filed this action to claim the sum of RM3,600,768.90 from the defendants. Judgment in default had been entered against the third defendant on 17 July 2013. The plaintiff did not pursue its claim against the second defendant as he was adjudged a bankrupt. Hence, the case before the High Court was only between the plaintiff and the first defendant.

[8] The first defendant disputed the plaintiff's claim. In its amended defence and counterclaim, the first defendant counterclaimed from the plaintiff for compensation for loss of profit and all losses suffered as a consequence of the plaintiff's breaches of the terms and conditions of the agreement as well as for wrongful termination of the facilities. Alternatively, the first defendant claimed that it ought to be granted specific performance of the letter of offer dated 8 August 2008.

[9] The counterclaim of the first defendant was premised on the following facts. As we had alluded to earlier, the first defendant was given a bridging facility of a total of RM9,846,000 to be released in three tranches. The plaintiff disbursed only the Tranche 1 on 26 December 2008 in the sum of

RM3,346,000. This was for the purpose of purchasing the land which the first defendant did. The land was valued at RM4.75m and was charged to the plaintiff as security. The term of payment of the facilities (which if it had been fully disbursed by the plaintiff) was that, it would be a redemption of individual title or each unit by the first defendant which shall be 32% of value of sales. If there is any shortfall a monthly instalment would be paid. However if the amount was released progressively by the plaintiff, an amended schedule of payment was to be provided. No amended schedule was provided by the plaintiff throughout the tenure of the facilities.

[10] The development of the land required a development order from Majlis Perbandaran Sepang. Only then could the land be converted from agriculture to residential. After which a development licence can be applied under the Housing Development (Control and Licensing) Act 1966. The first defendant encountered difficulties in getting the development order. Only about four years after the Tranche 1 was disbursed a termination letter dated 6 December 2012 was issued to terminate the facilities.

[11] It was because of the delay in obtaining the development order, a situation which was beyond the control of the first defendant, the first defendant sought for restructuring of the facilities to a further three year period. The first defendant caused two letters of 8 July 2012 and 27 August 2012 to be written to the plaintiff to propose the restructuring. Also offered by the first defendant in the said letter was to give a memorandum of deposit in the sum of RM1m as a further security. The plaintiff kept silent and did not respond. The first defendant also could not proceed to obtain the sub-division of the land to carry out the project because the plaintiff withheld the required consent. There was not an explanation on the reason for withholding the consent except that in the trial PW3 who testified on behalf of the plaintiff said the reason for withholding was because the plaintiff intended to foreclose the land. Despite appeals by the first defendant the plaintiff did not give its consent. Instead, the plaintiff terminated the facilities.

[12] There were lots of discussions and references to the relevant correspondences between parties on the issue of whether there was a concluded agreement on the proposed restructuring made by the first defendant. We do not find it necessary to deal with them in great detail for the purpose of this appeal. We would begin by stating the plaintiff's case as it were, that there was no concluded restructuring agreement between them. We then take a good scrutiny at the termination notice issued by the plaintiff dated 6 June 2013. In this notice it was stated in paras 5–6 that:

A Seterusnya kami dimaklumkan oleh anakguam bahawa berikutan surat tuntutan kami terdahulu yang bertarikh 06.03.2013, pihak tuan telah membuat cadangan penstrukturan segala pembayaran kemudahan pembiayaan di atas. Namun demikian, pihak tuan telah gagal mematuhi cadangan penyelesaian yang tersebut.

B Kami hari ini dimaklumkan bahawa pihak tuan telah enggan dan/atau gagal membayar kepada anakguam kami jumlah yang tertunggak di bawah kemudahan tersebut di mana setakat 04.06.2013 jumlah yang terhutang adalah berjumlah RM3,600,768.90.

C **[13]** Having perused through the said termination notice, it was quite apparent that the paragraphs that we had reproduced above, imply the acknowledgement of the plaintiff that there was such a restructuring proposed by the first defendant. The plaintiff had also made clear in this termination notice that the withdrawal of the earlier suit was on the reason of such restructuring proposal. Having stated so then the plaintiff went on to cite the D failure of the first defendant 'pihak tuan telah gagal mematuhi cadangan penyelesaian tersebut' had caused the plaintiff to terminate the facilities.

[14] We agreed with learned counsel for the first defendant that the E termination notice was bad for two main reasons. First, the termination does not stipulate what are the terms which the first defendant failed to observe that justify termination except to say 'gagal mematuhi penyelesaian tersebut'. Secondly, the plaintiff took an inconsistent stand that there was no restructuring concluded but yet cited and relied on the purported failure of the first defendant, to comply with the terms of settlement to justify termination. F

[15] The evidence in the appeal records on the proposed restructuring however revealed as follows. The plaintiff's witness PW3 had under cross-examination confirmed that there were three requirements to be fulfilled G pursuant to the terms of the restructuring. It was the first defendant's case that in the course of negotiations for restructuring, the plaintiff responded by a letter dated 10 November 2010 requesting for the following items namely:

(a) the appellant was to submit to the respondent Form 24 evidencing the transfer of shares in the appellant to Kamuja Corp;

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(b) the appellant was to pay the respondent the sum of RM6m towards amounts outstanding under the ASA; and

(c) the appellant was to submit to the respondent a copy of the conversion approval and approved building plans.

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[16] PW3 admitted under cross-examination that the first two requirements were fulfilled by the first defendant. PW3 further admitted that the application for conversion required a letter of approval from the plaintiff. As we had earlier alluded to, the plaintiff had withheld consent. In relation to this withholding

PW3 answered the reason being because the plaintiff had intended to proceed with foreclosure of the charged property.

[17] The learned High Court judge having examined the various correspondences between the parties had held that the plaintiff had not agreed to any restructuring of the facilities. In so finding, the learned High Court judge ignored the termination letter which clearly acknowledged and admitted the existence of an agreement to restructure the facilities. On top and above that, the termination notice had placed reliance on the failure of the first defendant to adhere to the terms of settlement being the ground for the termination of the facilities. The learned High Court judge had also failed to give due consideration to the evidence of the plaintiff's own witnesses in particular PW3 who admitted that the plaintiff had set down three requirements for the first defendant to fulfil for the restructuring and the first defendant had already fulfilled two of the said requirements.

[18] In his written submissions learned counsel for the plaintiff maintained the stand that there was no restructuring agreed by the plaintiff. This argument would fall in the face of the termination notice which the plaintiff issued to terminate the facilities; the ground for termination being failure to adhere to the settlement terms. Learned counsel for the plaintiff had also argued that there was default in payment terms by the first defendant. For one thing, no such failure had been cited in the termination notice.

[19] It was the first defendant's case that the plaintiff had induced first defendant to cause to be paid to the plaintiff the sum of RM600,000 on the basis that the facilities would be restructured and is therefore estopped by its conduct from denying the agreement to restructure the facilities (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283). The learned High Court judge had failed to consider the fact that the first defendant had paid an additional RM6m to the plaintiff on the understanding that this was a term of the restructuring.

[20] In finding that the termination was lawful, the learned High Court judge held that the original tenure of the facilities had expired on 24 December 2011 to justify termination on 6 June 2013. We agreed with the learned counsel for the first defendant that in coming to that conclusion the learned judge had failed to consider the fact that parties had continued to negotiate the restructuring of the facilities even after the expiry of the tenure. Therefore time has become at large and is no longer of the essence of the contract (see *Loke Yuen Cheng & Anor v Vimtex Sdn Bhd* [1998] 4 MLJ 169). This court had held that when time is of the essence of the contract and the party in the right allows the time for completion to pass and proceeded with negotiation, then time can no longer be regarded as of the essence of the contract and instead has become

at large (see also *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245).

[21] The termination notice had cited that the first defendant had failed to pay the outstanding sum of RM3,600,767.90. It was the evidence of the witness for the plaintiff, PW2 that no amended schedule had been issued since the schedule of the ASA would not apply in view of the fact that there was no full disbursement of the facilities. Without giving a new schedule of payment how then the plaintiff came up with outstanding of the disbursed amount?

[22] Having analysed the termination notice in the context of the background setting of the purported restructuring we are of the view that the facts as set out above reveal that the grounds relied by the plaintiff in the termination letter was wrongful. We therefore agreed with the learned counsel that the plaintiff had not provided a proper justification for the termination of the facilities which rendered the termination of the facilities unlawful. For that reason we agreed with the first defendant that plaintiff is liable to the first defendant for such wrongful termination.

[23] We now come to the quantum issue. The learned trial judge had held that no damages ensued since the first defendant had not established its counterclaim for wrongful termination. For that same reason the learned judge did not deliberate on the quantum claimed by the first defendant as its damages. We refer also to the decision of the supreme court in *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 and to the judgment of His Lordship Abdul Hamid Omar LP explained why the plaintiff in that case was awarded with the damages amount claimed based on loss of profits from its project. In *Mae Perkayuan* the Supreme Court had taken into account of the fact that the bridging finance was granted relying on the viability of the project therein as detailed out by the plaintiff's consultant at the time of obtaining the financing from the bank in that case. His Lordship Abdul Hamid Omar LP, speaking for the Supreme Court in that case had deliberated at length on how the court had arrived at its decision in the award for loss of profit as damages suffered by the plaintiff.

[24] We remained clueless as to how the financing amount for bridging financing in the present appeal was determined. It was indeed convenient for the first defendant to just bring into court evidence of the project cost and how much the first defendant would have obtained a profit had the project continued as the amount of loss it suffered. But was the bridging amount granted assessed on the project viability in the first place. We were not able to appreciate the loss of profit suffered by the first defendant in the way the court in *Mae Perkayuan* had been. It was never made clear by the first defendant as to the whether the bridging financing in this case had been carefully based on the viability of the project or otherwise.

[25] The claim on damages in its pleading is stated at para 26 of the *Pembelaan Dan Tuntutan Balas Defendan Pertama Terpinda* as follows:

(a) Satu deklarasi bahawa notis penamatan pembiayaan yang dikeluarkan oleh Plaintif melalui surat peguamcara bertarikh 06-06-2013 adalah salah dan memungkiri perjanjian;

(b) Pelaksanaan spesifik pembiayaan Plaintif yang dipersetujui melalui surat tawaran bertarikh 08-08-2008;

(c) Satu injunksi dikeluarkan untuk menghalang Plaintif daripada melaksanakan halang tebus atau sebarang tindakan yang lain terhadap 3 bidang tanah yang dipegang di bawah Geran Mukim No 1847, 1708 dan 1410, Lot 3222, 3223 dan 3224, Mukim Dengkil, Daerah Sepang di bawah Gadaian bertarikh 28.11.2008 sehingga pelupusan tindakan ini;

(d) RM34,323,431.08 ataupun sebarang jumlah lain bagi kerugian Plaintif yang ditaksirkan;

(e) Gantirugi am untuk kehilangan reputasi;

(f) Faedah pada kadar 5% setahun atas jumlah penghakiman dari 06-06-2013 sehingga penyelesaian penuh oleh Plaintif.

[26] Having heard submissions of parties on damages we were inclined to award damages in item (d) of para 26. The specific quantum of RM34,323,431.08 was submitted to be based on a report of a quantity surveyor ('DW1') who showed that the first defendant would have derived a sum of RM37,055,696.08, had the project proceeded. A deduction of further RM2,732,265 as profit due to the plaintiff will give a figure of RM34,323,431.08. Learned counsel for the first defendant further submitted that the evidence of PW1 was left unchallenged by the plaintiff.

[27] In our view whether or not there was a challenge posed on the report by DW1, the first defendant would have to first establish what are the damages resulting from the wrongful termination. For example it cannot be assumed that the wrongful termination per se had caused the project to scuttle. There is evidence as submitted by learned counsel for the plaintiff that the first defendant was in no financial position to complete the project which required RM45m to complete in the first place. Even if the plaintiff had disbursed the two tranches it would be for only RM9,846,000 which would not suffice to complete a RM45m project. We do not agree therefore that the damages claimed by the first defendant should simply be based on the project amount after deducting the profit to the plaintiff per se, as loss suffered by the first defendant.

[28] For the above reasons, we make an order for the damages to be assessed

before the registrar. The damages suffered if any is to be assessed on the basis that they are damages suffered as a consequence of the unlawful termination. We therefore allowed the appeal by the first defendant with costs and remitted the case to the High Court before the registrar for damages to be assessed.

Appeal allowed.

Reported by Ashok Kumar